Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR APPELLANT

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Opinions Below

The court below wrote an opinion which is reported at 88 A. 2d 800. [61-66][1] An earlier opinion answering certified questions in this case appears at 97 N. H. 91, 81 A. 2d 312. [1-7]

Jurisdiction

The judgment of the Supreme Court of New Hampshire affirming the judgment of the Superior Court was

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

entered on April 26, 1952. [66, 70] The judgment became final on June 3, 1952, when the motion for rehearing was denied. [71] The petition for appeal to this Court was allowed within 90 days after the judgment became final. [73-74] The appeal to this Court was timely allowed. [73-74] Probable jurisdiction was postponed by this Court on November 10, 1952. [78]

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Questions Presented

I.

Is the administration and enforcement of the ordinance by the City Council, requiring a permit for holding meetings in the parks of Portsmouth so as to deny all applications made by religious organizations to hold religious meetings and deliver religious talks in the parks of Portsmouth, an abridgment of freedom of speech, assembly and worship in violation of the First and Fourteenth Amendments to the United States Constitution?

How Question Raised

The trial court held that the denial of the application for a permit under the ordinance by the City Council of Portsmouth was arbitrary and unreasonable. [13]

It is an ambiguous holding as far as one aspect of the federal question is concerned.

This Court may assume that the trial judge meant that it was the duty of the City Council to issue the permit in view of the ordinance's being identical to the state statute in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508. He had before

him the language of the Supreme Court of New Hampshire in *State* v. *Derrickson* [5], where the certified questions in this case had been answered.

Finding that the denial of the permit was arbitrary may also have meant that there was an unconstitutional denial of the application by the City Council and, therefore, the enforcement of the ordinance by the City Council was in violation of the rights of appellant contrary to the First and Fourteenth Amendments to the United States Constitution.

Regardless of the ambiguity of the holding of the trial court there is none when consideration is given to the ruling of the court on the motion for judgment of acquittal. The motion specified three grounds, the last of which raised the federal question. [12] This motion was denied by the trial court and carried up to the Supreme Court of the state by proper bill of exception. [11, 13]

This exception presented to the Supreme Court of New Hampshire the question. It is whether the ordinance as enforced by the City Council, under its policy to refuse religious meetings in the park, was a violation of the federal Constitution. This was the same question presented to the Supreme Court of New Hampshire on the certified question on the first transfer of the case. See top of page 2 in the record in this case. [2] In that case the court stated the question to be "whether the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner". [5] The court said that it need not decide the question on the certified questions submitted because of the zoning of parks in Portsmouth. [4, 5, 6] This zoning theory was disproved. It did not exist as a fact. [39, 44, 46-47, 49, 50, 51, 52, 56]

When this question was again put to the court it was held that regardless of the action of the City Council, the appellant was guilty because he took the law into his own

hands by talking in the park and not applying for a writ of mandamus and waiting until such civil proceedings were completed. [61-66]

Should this question, evaded by the Supreme Court of New Hampshire, be passed on here; or, should it be remanded to the court below to determine? *Musser* v. *Utah*, 333 U.S. 95.

II.

Does the construction and application of the ordinance and the law of New Hampshire so as to require appellant to apply for a writ of mandamus or certiorari as the only remedies to correct the unconstitutional administration of the ordinance, and also so as to deny the defense in the criminal prosecution that the construction and application of the ordinance by the City Council was in violation of his rights guaranteed by the federal Constitution, amount to an abridgment of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments to the United States Constitution?

How Question Raised

The motion to dismiss and for a judgment of acquittal, under ground three, stated that if the law "was construed and applied so as to justify" a conviction "under the facts in this case" the rights of defendant "to freedom of assembly, freedom of speech and freedom of worship" would be denied contrary to "the First and Fourteenth Amendments" to the United States Constitution. [12] Denial of this motion presents the question stated above. [11, 13]

III.

Is the denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States?

How Question Raised

It is submitted that the mentioning of the Fourteenth Amendment in the motion to dismiss is sufficient to argue the denial of procedural due process in violation of the Fourteenth Amendment. [12] The motion was denied. [11] In the petition for rehearing under ground three the denial of procedural rights in violation of the Fourteenth Amendment was specifically assigned and the motion stated that the ground was "raised in the bill of exceptions". [67] Under ground four of the petition for rehearing the appellant for the first time raised the question that the construction of the ordinance in the criminal prosecution so as to deny appellant the right to challenge the validity of the administration of the ordinance by the City Council transformed the ordinance into a bill of attainder. [67-68] The petition for rehearing was denied. [71] Under assignment number two in the assignments of error in the petition for appeal this ground was brought forward along with the complaint against the denial of procedural due process that was properly raised in the motion to dismiss. [73]

IV.

Are the decisions of the courts below based on an adequate nonfederal ground to support the judgment of affirmance of the conviction?

Statute Involved

This case draws into question the validity of an ordinance of the City of Portsmouth, New Hampshire, Chapter 24, Article 7, which, among other things, reads as follows:

> Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.
>
> Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open-air public meeting.
>
> Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession, or open-air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars. [1, 9-10, 61-62]

A statute identical in terms to this ordinance was construed in a valid manner by the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, affirmed in *Cox* v. *New Hampshire*, 312 U. S. 569. The court below in this case placed the same construction on Sections 22 and 24 of the ordinance above quoted. See the opinion of the court. [3] The court, however, did not determine whether this construction of the ordinance made invalid the unwritten policy of the City Council, which forbids the issuance of

any permit for religious meetings and talks to religious assemblies in the parks of Portsmouth.

The Supreme Court of New Hampshire, in answer to the certified questions, stated that the case presented a question of constitutionality of whether "the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner". [5] This question stated by the court was evaded by a false finding made to the effect that the city of Portsmouth had zoned its parks for religious meetings, allowing some such meetings in certain parks and forbiding them in others. [4, 5, 6] On an appeal in the criminal trial, the Supreme Court of New Hampshire again did not pass on the question but resorted to the proposition that the defense was forfeited because appellant defied the law and took it into his own hands by holding a meeting and giving the talk in the park without first going to the courts to get a writ of mandamus against the City Council. [61-66]

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

NATURE AND HISTORY OF THE ACTION

This is a criminal case. [9] It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in the Superior Court. [10-11] The appellant was proceeded against in the Municipal Court of Portsmouth by complaint. [2, 15] He was charged with violating the ordinance in question on July 2, 1950. [10] A companion complaint was made against Derrickson, now deceased. [14][2] The pertinent part of the complaint charged that Poulos did "on a certain ground abutting a public street, to wit, Islington Street and upon certain ground abutting thereto known as Goodwin Park, did conduct an open-air public meeting without having first obtained a license from the City Council so to do". [10, 15]

The appellant pleaded not guilty in the Municipal Court. He was found guilty and fined. [10] He appealed to the Superior Court. [10-11] On the first hearing before the Superior Court of New Hampshire the case was reserved and at an earlier term transferred to the Supreme Court of New Hamshire for answer to certified questions. [1-7, 10, 61] The parties there stipulated the facts. [1-2] The Supreme Court of New Hampshire held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Portsmouth. [1-7] See 97 N. H. 91, 81 A. 2d 312.

[1] The case against him was discontinued and abated upon appeal from the conviction by the Supreme Court of New Hampshire. [62-63]

The case was tried in the Superior Court following the opinion of the Supreme Court of New Hampshire. [10-11] The appellant pleaded not guilty. [11] A jury trial was waived and the case was tried to the judge alone. [11, 15] At the close of the evidence a motion for judgment of acquittal was made. [11-12, 56-57]

The case was taken under advisement and on December 6, 1951, the court rendered a judgment convicting appellant. [12-13] A brief memorandum opinion stating the reasons was filed by the court. [12-13] The judge found that the application for the permit had been arbitrarily and capriciously refused. [13] But he convicted on the ground that it was the duty of appellant to resort to a civil action for mandamus and not defy the law and throw the controversy into the criminal courts. He held that by defiance of the law the appellant forfeited his right to make his defense of unconstitutionality of the enforcement of the law. [13] He convicted and fined appellant $20.00. [13] Appellant duly appealed to the Supreme Court of New Hampshire. [14]

The constitutional questions (except the bill of attainder question) were raised in a motion to dismiss filed in the Superior Court of New Hampshire. [12, 57] Each question presented in the trial court was considered and overruled in a written opinion. [13] Each holding of the trial court was presented on appeal to the Supreme Court of New Hampshire and duly assigned as error. [14] Each federal question presented upon this appeal also was presented to the Supreme Court of New Hampshire in the brief, on oral argument. The bill of attainder question was first presented by the motion for rehearing. [61-66, 67-70]

Facts

The appellant is a duly ordained minister of the gospel. He was assigned to serve Jehovah's witnesses in the city of Portsmouth, New Hampshire. [22] The congregation is a duly recognized group of Christian people. [22-23] The congregation is essentially evangelistic, composed primarily of missionaries engaged in door-to-door and street distribution of Bibles and Bible literature. [22]

In the spring of the year 1950 the congregation, acting through Derrickson, now deceased, and Poulos, made application to the City Council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park, [35-36] A written petition was duly addressed to the City Council of Portsmouth and filed with the clerk. [2, 36] The appellant and Derrickson were informed that they could appear and speak in behalf of the petition before the City Council. [2, 36] The petition was placed on the agenda for hearing May 4, 1950. [2, 36] On that date Derrickson and Poulos appeared before the City Council, Derrickson doing the speaking in behalf of the congregation of Jehovah's witnesses. [2, 38-39] The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. [2, 36-37] The City Council was informed of the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question. [2, 23, 36-37] Derrickson showed that the talks related to an explanation of Bible prophecy, showing the cause of the suffering of mankind, the reason for the failure of the governments of this world to bring about a desired peace and the remedy for all the sufferings of mankind, as well as the failure of the governments to bring relief. It was pointed out to the City Council that the speeches were designed to prove that Almighty God Jehovah will set up a government of righteousness over the earth that will stand

forever and bring peace, prosperity, happiness and everlasting life to men of good will toward him. [2, 37-41]

The City Council was informed that the assemblies as well as the speeches proposed to be delivered in the park were to be open to all and that the public would be freely invited and none excluded. [41] The series of proposed lectures to the proposed assemblies in the park would show that the people are now living in the "last days" referred to in the Bible and that the great cataclysm of Armageddon is rapidly approaching, from which all honest people desire to find a way of safety and protection. [37-40] It was pointed out that the meetings came within the guarantee of freedom of assembly, freedom of speech and freedom of worship. [38] Derrickson read to the City Council excerpts from decisions of the Supreme Court of the United States. [38]

The petition was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks, and that it was the policy not to permit any religious meetings in the park. [2, 39, 44, 46-47, 49, 50, 51, 52, 56]

Thereafter Jehovah's witnesses planned to hold their requested series of public meetings in Goodwin Park notwithstanding the refusal of the City Council to grant the petition for a license. [23, 39] They selected a spot in the park for assembling and the proposed talk was advertised. [23, 39]

Jehovah's witnesses planned to give a talk and hold a public meeting in Goodwin Park on Sunday, July 2, 1950. On this date Poulos was selected as the speaker. [23] At three o'clock on that afternoon Poulos made his appearance at the park together with a large number of other persons assembled therein to listen to him speak. [24] He had as title for his public speech "Preserving Godliness Amid World Delinquency". After being introduced he began his talk, which was orderly and without a disturbance. [23-

24] He spoke for about fifteen minutes. [25] He summarized what he said:

"I showed by chapter outline how the delinquency which is rampant upon the earth has come to its apex having been increasing by generations down through the ages even so very wicked at one time in the days of Noah that God saw fit to destroy that generation of people, and the purpose of that talk, what it has in store, is endeavoring to work out through a congregated lot of people today is to inform the people of the coming disaster, world disaster, the approach of the great cataclysm of Armageddon the Bible refers to it as a great day of God Almighty and it is absolutely necessary for people to take an intelligent stand in the light of truth and religion, to turn aside from the ways of the world and take our aid to people in this connection." [24]

At 3:15 Poulos was stopped by a police officer who asked him if he had a permit to hold an open-air meeting in the park and to give the talk. [25] Poulos answered that he did not have a permit because the City Council had denied the petition for a license and then added that he did not have a permit because it was not necessary. [25, 29] The officer informed him that he would have to stop speaking. [25, 29] Poulos informed the officer that he intended to continue. [25, 29] The officer told him that he would be arrested. Poulos continued. [25, 29] He was arrested and transported by automobile to the police headquarters where he was charged by warrant and complaint in the manner above recited. [25-26, 29]

Poulos testified that if he had been permitted to continue with the speech he would not have said anything that would have created a disturbance or annoyed other people in the park. [27] He outlined to the trial court the remainder of his talk thus:

"Well the subject itself, as I said in previous testimony, it dealt with this delinquent situation in the world, delinquency in every form which is to be found today, I guess

nobody will dispute that fact, and I would have told the people that from the, God's creation more or less such condition has been upon the world and it has been instilled in the men, men who do not listen, have no proclivity towards the words of Almighty God and they have been carrying on this campaign of delinquency and in order to oppose the works of Almighty God. I would have told them further that the purpose of that, that they allow these things to continue without interference is because He has a definite purpose to show. The bible shows that, ordinances of the bible, the bible shows God has foreseen about all this, that those who are in this part of the universe, because this is where delinquency first arose, and Almighty God, and try to sweep the world in delinquency, that we should not be perturbed unduly about these conditions because we know fully well we have God's word that he is going to cancel them out forever. The means he takes to do this, I would have further told them, the means he takes to do this is through the kingdom of heaven, we pray for that kingdom and the model prayer which we are instructed by Christ Jesus when he said, 'Our Father in heaven, hallowed be your name, your kingdom come', and I believe that and we want other people to believe it too because we know that is the means by which salvation and an end to all these disturbing conditions would come to an end but before this could be fully accomplished men from every walk and every avenue in life, men of all walks would have to come and pay their obeisance to the Almighty God." [26-27]

The stipulation of fact on the first transfer of the case to the Supreme Court of New Hampshire and the undisputed evidence on the trial of the case showed that there was no annoyance or disturbance in the park by that part

of the speech which was given. [2, 25] Also there was no interference of the use of the park by others established. The contrary was proved. [2, 25]

While there was evidence that no personal application was made by Poulos, there was a request for a permit to cover the giving of his talk by him made in the petition filed by Jehovah's witnesses. [27-28, 36-37]. Poulos said that he did not defy the law but went ahead in the good-faith belief that he had a right to speak without a permit because the application had been illegally denied. [28]

The testimony of the councilmen of Portsmouth was uniformly that the city did not have any ordinances or regulations whereby any one park was selected for the purpose of holding religious meetings. They all agreed that there was no type of zoning or selection of the parks for recreation purposes. They all testified that the policy was to deny all applications for permits for religious use on the ground that if they granted a permit for one they would have to give one to all religious organizations. It was admitted that they claimed discretion under the ordinance to refuse religious organizations the use of the parks. [39, 44, 46-47, 49, 50, 51, 52, 56]

This testimony of the officials directly contradicted the finding of the Supreme Court of New Hampshire on the reserved case answering the certified questions in advance of the trial in the Superior Court of New Hampshire. [4, 5, 6] 97 N.H. 91, 81 A. 2d 312. There in that opinion the court went out of the record and found a fact that was not in the record and one that did not exist according to the testimony of the councilmen and the clerk of council of the city of Portsmouth. [39-56]

Summary of Argument

I.

The administrative policy of the city of Portsmouth, in its enforcement of the legal regulatory ordinance concerning the use of its parks, which unwritten policy prohibits the giving of religious talks and the holding of religious meetings in the park, is an unconstitutional construction and application of the ordinance contrary to the federal Constitution. Such a policy abridges the rights of freedom of assembly, speech and worship guaranteed by the First Amendment to the Constitution.

History, from the dawn of its records, shows that the market places, the plazas, the public beaches and the public streets are used as places of public preaching. The common law recognized public preaching as one of the rights of assembly guaranteed by the common law. When the First Amendment was adopted it was intended to codify, as well as expand, the existing common law rights and liberties exercised in England, which included the right to street and park preaching. The modern practice in Columbus Circle in New York city and in thousands of other public parks throughout the United States shows that the guarantees of assembly and speech secures this right to preachers to speak to crowds gathered in the parks. *Kunz v. New York*, 340 U. S. 290.

A sophisticated stretching of the doctrine of separation of church and state so as to prohibit religious meetings in the parks should not be adopted by this Court, because it will erase history on park preaching. If it is, it will mean the beginning of the end for religious freedom in this country. It will spell godless disintegration of the religious institutions of the nations from the inside of its borders while the nation copes on its outside with dangers of assaults against this bastion of freedom of worship by irreligious police states of the world.

II.

The specious argument of expediency and the desire to maintain order by fashionable local appeal to the courts for writs of mandamus or certiorari as the only means to correct the unconstitutional denial of the applications for a permit to use the city park for purpose of assembly, is a specious theory rejected by the First Amendment. Such invention is an abridgment of the exercise of the civil liberties guaranteed by it and secured against state abridgment by the Fourteenth Amendment.

The common law liberty of speech included the right to speak publicly in any park on any subject without prior restraint. The First Amendment prohibited any abridgment of any liberties that can be exercised in a public park. Abridgment means not only prohibition and censorship but also means anything which shortens the exercise of the liberties or which burdens them.

The procedural doctrine of first applying to the courts to get compulsory process to permit the exercise of constitutional liberties is a plain, definite and certain abridgment or burden to freedom of speech and assembly. One burden upon such liberties by the judicial process is the tremendous expense of litigation. A much greater abridgment or curtailment of the liberties falls upon both the *broadcaster* as well as the *receiver* of ideas; disseminated by the exercise of freedom of speech and assembly. This is the burden of time.

The time-consuming delays in getting a final decision from the highest courts of the states or the nation would hobble and make ineffective freedom of speech and assembly in times of emergency or during political campaigns. All arbitrary officials in municipalities would have to do is to throw broadcasters of ideas into the judicial hopper, knowing that the writ will finally emerge at too late a date to help local *receivers* of ideas out of the clear and present

danger the *broadcaster* seeks to remove them from. Any practical-minded lawyer knows this.

The historic exercise of freedoms of speech, press and worship has been subject to only one judicial touch. That touch is light. It is never heavy or applied before the fact of use of the rights but (according to Blackstone and Cooley) after the fact of *abuse* of the use of the fundamental rights. It was never contemplated that the exercise of the rights should hinge on judicial writs regardless of how arbitrarily regulatory permits have been denied.

While considerations of expediency may well justify a rule which would force applicants for permits to operate a liquor store or a pool hall to first resort to the courts for writs of mandamus and certiorari before operating their businesses without a permit, these considerations are not sufficient to burden or shorten the liberties of speech and assembly guaranteed by the First Amendment. *Schneider* v. *New Jersey*, 308 U. S. 147 at page 161.

Freedoms guaranteed by the First and Fourteenth Amendments are *hair-trigger* weapons that can be resorted to on the spot by every citizen to defend the institutions of the country or of any group in the country. It is not necessary, before using the weapons protected by the First Amendment, to wait months for a final order approving the use of the rights to filter down to the lower level of the ordinary citizen from the judicial high command of a state or the nation. These rights are available to all persons to use, subject to only one judicial restraint. That is judicial reckoning for the abuse of the use of the rights. There is no prior judicial approval required.

III.

It does not require extensive statement to show that where a citizen is proceeded against, there he can defend. The right of self-defense carries with it the right to fight the aggressive assaults of an adversary in court, as well

as on the streets or elsewhere. In criminal actions to enforce violations of orders of administrative proceedings the question of constitutionality of the administrative order is open to question in defense to the prosecution. *Estep* v. *United States*, 327 U.S. 114. Due process of law requires this in proceedings in the state courts. *Hovey* v. *Elliott*, 167 U.S. 409, 413-418.

The appellant had a constitutional right to have the state courts consider whether or not the administrative enforcement of the law by the City Council of Portsmouth had violated his constitutional rights.

There is no question of failure to exhaust administrative remedies. There were no administrative remedies provided for in the ordinance. The remedies of mandamus and certiorari are judicial remedies and are not administrative remedies. Appellant was entitled to exercise his constitutional right without first resorting to a judicial remedy of the State of New Hampshire.

IV.

It is obvious that the state procedural problem is so intimately intertwined and so mixed up with the federal questions that it cannot be said to be substantial or adequate or sufficient enough to independently support the conviction and affirmance.

Argument

I.

The administration and enforcement of the ordinance by the City Council, requiring a permit for holding meetings in the parks of Portsmouth, so as to deny all applications made by religious organizations to hold religious meetings and deliver religious talks in the parks of Portsmouth, is an abridgment of freedom of speech, assembly and worship in violation of the First and Fourteenth Amendments to the United States Constitution.

Freedom to preach is not limited to preaching from the pulpit in some privately owned building. From time immemorial the right has been exercised on the streets, in the parks and by the seashore. It must be remembered that Jesus spoke to multitudes at the seaside. The apostles preached His gospel of the kingdom at the market place, as well as from door to door. They forsook no public avenue that was open to them to preach in an orderly and decent manner. Secular history abundantly attests the use of the public streets and the parks as appropriate places to preach. See Appendix to Appellant's Brief in *Fowler* v. *State of Rhode Island,* No. 340, October Term, 1952.

Since the Toleration Act in England religious preachers have been given in Anglo-Saxon and American municipalities the same right to make use of the streets and public parks as is accorded to every other speaker on any other speech.

The Salvation Army has for a long period of time, since its inception in fact, made use of the streets as a place to preach. The right of the Salvation Army to preach on the streets has never been questioned by the English and Scottish courts. *Beatty* v. *Gillbanks* (1882) 51 L.G.M.C. 117; 9 Q.B.D. 308. The only legal restraint that the common law has imposed upon street preaching is that it be not

abused. Lord Young, in *Deacin* v. *Milne* (1882) 5 Coup. 174, at page 184, said: "With regard to the Salvation Army, I think the magistrates of any town should observe a good natured abstinance from interference and continue in tolerance of them so long as there is no evil arising or to be reasonably apprehended." See *M'Ara* v. *Magistrates of Edinburgh* [1913] Session Cases 1059.

The First Amendment not only codified the existing liberty of speech and assembly in England at the time of its adoption but also intended to give the broadest liberty possible to even religious speakers at assemblies in public places on any subject. See *Bridges* v. *California*, 314 U. S. 252, at page 263.

Since its inception under the Constitution the people have been permitted to exercise the broadest liberty possible in an ordered society in connection with street and park preaching. Walk through Columbus Circle in New York city on any evening or at any other similar park in the large cities of the United States and street preachers will be found expounding their doctrines. See *Kunz* v. *New York*, 340 U. S. 290. While the exercise of this right is subject to regulation by the city as to time and place, it has never been doubted that a city has no authority whatever to completely deny all requests for permits for religious meetings under the guise of regulation. This Court has said that the exercise of these rights may not be abridged under the guise of regulation. See *Schneider* v. *New Jersey*, 308 U.S. 147, at page 160; *Cantwell* v. *Connecticut*, 310 U.S. 296, at page 304.

It is apparent that, in the light of history, religious speakers are entitled to make the same claim to the use of parks and streets as was recognized by this Court in its famous statement on the use of streets and public parks in *Hague* v. *C.I.O.*, 307 U. S. 496, at page 515, which was followed by a unanimous Court in *Jamison* v. *Texas*, 318

U. S. 413 at page 416. See also *Kunz* v. *New York*, 340 U. S. 290.

Since a law which absolutely forbids any sort of assembly at appropriate public places, such as a public park, is invalid, and inasmuch as religious speakers cannot be pushed away from their historic position at appropriate public places, it must be concluded that the policy of the city of Portsmouth not to permit religious talks and assemblies in its parks constitutes an unconstitutional construction and interpretation of the ordinance that brings it into conflict with the First and Fourteenth Amendments. This Court has held that the unwritten policy of a city which was enforced in an illegal manner was an abridgment of liberty guaranteed by the First and Fourteenth Amendments in a case similar to this. *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). See also *Kunz* v. *New York*, 340 U. S. 290.

The invalidity of the construction of the ordinance placed upon it by the city of Portsmouth is fully demonstrated by the argument appearing in the brief filed in behalf of the appellant in the companion case of *Fowler* v. *Rhode Island*, No. 340, October Term, 1952. Reference is here made to that brief for further argument on the unconstitutionality of a state administration policy which forbids religious assemblies in the parks of a city. That argument is adopted here and made a part of this argument, as though copied at length herein.

When the case was certified by the Superior Court to the Supreme Court of New Hampshire the latter court sustained the validity of the enforcement of the ordinance on the theory that there was a policy of zoning the parks in Portsmouth for religious meetings. On a trial of the case this theory was disproved. It was proved never to exist. It did not exist at the time this case was tried, which was on the return of the answers to the certified questions to the Superior Court. The Superior Court did not expressly determine the constitutional question, although it was plain-

ly raised in the motion to dismiss. The Supreme Court of New Hampshire side-stepped the issue by concluding that since mandamus was the only remedy to urge, the defense stated in the motion to dismiss had been forfeited, and the constitutional question could not be passed upon in criminal proceedings.

Under all of the facts and circumstances, this question presented under this first point in this case ought to be passed on by this Court, notwithstanding the fact that it has been evaded by the New Hampshire courts. Ordinarily in a situation like this it would be proper to remand the case to the Supreme Court of New Hampshire to pass on this federal question. The question is being determined, however, in the companion case of *Fowler* v. *Rhode Island,* No. 340, October Term, 1952. Inasmuch as the Supreme Court of New Hampshire has evaded a determination of the question and has for over two years frustrated the efforts of the appellant to get relief, it would be timely and important for this Court to determine the question and set at rest the controversy. Thus, further litigation would be avoided, which will be needless in view of the fact that the Supreme Court of New Hampshire will be forced to follow the decision of this court in *Fowler* v. *Rhode Island,* No. 340, October Term, 1952, in event this Court in that case sustains the appellant's contention and holds that the ordinance in that case is unconstitutional.

Should this Court, however, not agree with the appellant on the propriety of determining this question in this case, the very least that should be done is to remand the case to the Supreme Court of New Hampshire with directions to finally face the issue, as this Court ordered in *Musser* v. *Utah,* 332 U. S. 95.

It is respectfully submitted that this Court should hold that the construction and application of the ordinance by the City Council of Portsmouth is in conflict with the First and Fourteenth Amendments. Otherwise the case should

be remanded to the Supreme Court of New Hampshire for a consideration of this point.

II.

The construction and application of the ordinance and the law of New Hampshire so as to require appellant to apply for a writ of mandamus or certiorari as the only remedies to correct the unconstitutional administration of the ordinance, and also so as to deny the defense in the criminal prosecution that the construction and application of the ordinance by the City Council was in violation of his rights guaranteed by the federal Constitution, amounts to an abridgment of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments to the United States Constitution.

The contention of the appellant is that the decisions of the courts below, holding that he should have resorted to mandamus or certiorari and not exercised his constitutional rights without approval of the courts and that he forfeited his rights in the criminal trial by taking the law into his own hands, is an abridgment of rights guaranteed to him by the First and Fourteenth Amendments. While appellant does not contend that he has been absolutely denied constitutional rights by the face of the ordinance, the fact of the matter is that the enforcement of it by the city of Portsmouth, did prohibit him from exercising his rights guaranteed by the First Amendment.

Inasmuch as the Superior Court of New Hampshire has held that this policy is unreasonable and since both of the courts below have denied appellant the right to challenge the validity of the ordinance in these proceedings, appellant takes the position that the judicial interpretation of the ordinance so as to deny him his rights also constitutes an abridgment of his liberties.

When the administrative action of the City Council in prohibiting the use of the park is combined and integrated

with the judicial action of the state or the evasion of the constitutional question by the courts, there is a joint absolute state denial of liberties guaranteed by the First Amendment. The concerted state action by the administrative officials of Portsmouth and the judicial officials of New Hampshire constitutes a violation of the rights guaranteed by the First and Fourteenth Amendments.

Taken separately or disintegrated, the prohibition (so as to isolate the rulings of the courts forfeiting the right to make the defense) must be, nevertheless, concluded to be a violation of the rights guaranteed by the First and Fourteenth Amendments.

It may be said, for purpose of argument, not to be absolute prohibition or prior censorship to first go to the courts before exercising liberties guaranteed by the First Amendment. It nevertheless remains an inescapable fact that forcing appellant to run the judicial gauntlet of New Hampshire, before he can exercise liberties guaranteed by the First and Fourteenth Amendments, constitutes a wanton abridgment or burdening of his liberties. It should be remembered that the Constitution is not confined to proscribe censorship and prohibition. It also prevents *abridgments* or *burdens* upon the exercise of such liberties.

Considerations of the practical consequences of forcing a citizen to hire a lawyer and run the judicial gamut and engage in long litigation before all the judges of the state, as a condition precedent to exercising rights guaranteed by the Constitution, leads the pragmatical and judicial mind to the inevitable conclusion that is is an abridgment of liberty guaranteed by the First and Fourteenth Amendments.

The very nature of freedom of speech and assembly implies *hair-trigger* exercise of rights in time of emergency, peril or during election campaigns. If these fundamental personal rights, so vital to the maintenance of

democratic institutions, are to be bogged down by the niceities of procedural technicalities of state remedies of mandamus and certiorari and slowed up by high-priced lawyers and long, involved and complicated opinions of the judges, they will be of little, if any, value to the people, regardless of the type of ordinance involved. Whether the ordinance is purely regulatory and constitutional on its face and as construed by the judges, the facts remain that the citizen ought not to be forced to go to the judges for judicial review of arbitrary administrative action as a condition precedent to the exercise of liberties guaranteed by the First and Fourteenth Amendments.

The common law under the Stuart kings required censorship of ideas or prior judicial review of speech by the Stuart judges. When the censorship law was done away with judicial review by judges, as well as by the king's censor, as a condition precedent to speech, was completely abolished. The common man then, under the common law, was required to come before judges only for the abuse of the use of his right or after the exercise of the right. *De Jonge* v. *Oregon,* 299 U. S. 353 at page 364-365, which is presently the constitutional law of the United States. This shows that freedom guaranteed by the First Amendment precludes prior judicial review.

Since a man may not now be called upon to make an appearance before the king before he speaks, why should he be called upon to appear before judges and prove he has a right to say what he intends to say, which the judges know is guaranteed by the law of the land before they hear him? How ridiculous! This is especially true where all administrative regulative power has been exhausted, as here, by properly applying for a permit. Such alien theory, if grafted onto the law of speech and assembly in the United States, would plunge us back into the dark judicial pit of the Stuart judges and Star Chamber censorship of ideas.

This Court has indicated that previous restraint of any

kind is an infringement of freedom of expression guaranteed by the First Amendment. See *Near* v. *Minnesota*, 283 U. S. 697, at page 716. In the recent case of *Burstyn, Inc.* v. *Wilson*, 341 U. S. 329, the Court said that the *Near* decision "recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection".

The issues in this case were made under the Constitution of the United States as of the date that the appellant attempted to exercise his liberties in the park. Up to that date his federal constitutional rights had been violated by the administrative determination of the state government. The City Council had unconstitutionally construed their discretionary powers under this regulatory ordinance and reached the conclusion that they could prohibit religious assemblies in the park. This administrative determination, and the subsequent exercise of the rights guaranteed by the Constitution in Goodwin Park by the appellant, framed the questions to be determined under the federal Constitution.

When the case first reached the Superior Court that court was undecided as to the constitutionality of this administrative construction of the ordinance. It transferred the matter to the Supreme Court of New Hampshire for answers to certified questions. That court did not say whether the policy of the city in denying all religious meetings in the parks of Portsmouth violated the Constitution. The question presented to it was evaded by a ruse. This was later proved to be without foundation in fact. At the trial of the case the Superior Court then evaded the issue of the constitutionality and resorted to a forfeiture of appellant's rights on the theory that he had violated the rules of judicial etiquette, defied the law of New Hampshire and that he had taken the law into his own hands by exercising

rights guaranteed to him under the First and Fourteenth Amendments!

While the ordinance properly interpreted and construed by the New Hampshire courts brought it within the decision in the *Cox* case (91 N. H. 137, affirmed 312 U. S. 569), the fact is that the construction and application of the ordinance by the City Council constituted a deprivation of appellant's liberties. It is this construction and application of the ordinance, made by the administrative branch of the state government, that appellant complains of here. It is that which he sought to raise and get determined in the state courts, but he failed.

Even though the ordinance may be said to be regulatory on its face, it has been administered in an unconstitutional manner. This made it unnecessary for the appellant to appeal to the judicial arm of the state government as a condition precedent to exercising liberties guaranteed by the First and Fourteenth Amendments.

Let us now turn to some of the practical consequences of adopting this new theory in federal constitutional law invented by the New Hampshire courts, as a basis for putting people of that state in the bastille who dare to courageously exercise the liberties guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This state policy seems to be contrary to the common law policy of England and Australia, which is the lowest standard that the Fourteenth Amendment permits. It shows that citizens who are willing to submit to hardship and possible imprisonment as they fight for their constitutional rights against the encroachment of the executive are performing a vital public function. They are protecting the rights of all the citizens.

In the Australian case of Ex parte *Sinderbury* [1944] S.R. 263 at 270, Chief Justice Jordan speaks with approval of those prepared to stand for their rights against the full

power of the Crown that ordinary citizens are afforded " . . . no means of knowing whether any particular direction was legitimate or a piece of gratuitous executive or bureaucratic despotism. An occasional Hampden might be found with courage enough and money enough to face the risks of imprisonment for an indefinite term and a fine of any amount and able and willing to fight an instance of unlawful dictation up to the High Court, but the ordinary citizen would have no real alternative to submitting to any order that might be given him". See also *Dyson* v. *Attorney General* [1911] 1 K.B. 410.

The Hampdens who are prepared to stand for their rights and to contend against governmental lawlessness, whether executive or judicial, fulfill an important public service. If they did not have the courage to raise the issues by disputing the actions of the officials, then official lawlessness could continue unchecked and often beyond the reach of the courts. This Court should be glad to see these issues come up, in the manner that appellant raises them here, for determination that all may know what the law is, and abide by it. The effort to deny judicial determination of the fundamental constitutional question because the appellant has had the courage to stand foursquare on the federal Constitution should be immediately rejected by the Court.

In fighting for their liberties, the way they are, Jehovah's witnesses are building a buttress of protection for the rights of all the American people. This warfare on behalf of elementary liberties has not been waged by this minority group without a terrific toll in human suffering, abuse, financial drain and heartache. Cold statistics of cases fought do not tell the whole story of this modern inquisition.

In battling for their legal rights (and, incidentally, for all the people) Jehovah's witnesses in the United States have helped this Court grow the flesh of practical appli-

cation onto the bare skeleton of the freedom-of-worship provision of the First Amendment to the Constitution. The immense public benefit resulting from the work of this small group has been recognized. Mr. Justice Murphy remarked in *Prince* v. *Massachusetts*, 321 U. S. 158:

" . . . Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little-used ordinances and statutes. See Mulder and Comisky, 'Jehovah's witnesses Mold Constitutional Law', 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." (321 U. S. at pages 175-176)

It is Portsmouth and the State of New Hampshire who are defying the fundamental law stated in the federal Constitution by seeking to do what they have no legal authority to do. The mere fact that they are both official bodies—executive and judicial—does not make their every action lawful. When they seek to exceed their jurisdiction in defiance of the Constitution that they agreed to support, the sovereign citizen has both a right and a public duty to call their hand and to ask from this Court a judicial determination of whether or not their actions are constitutional.

This Court and all parties should be glad that the constitutional questions are here raised in these criminal proceedings so there may be a proper determination of the issues. The citizen who raises this issue is doing an important public service, and must not be driven from the judgment seat by specious arguments of the State of New

Hampshire. Appellant is prepared to abide by the fundamental law as set out in the Constitution of the United States. All he asks is that the appellee be forced to abide by the same document through "equal justice under law".

The principle laid down by the court below burdening the exercise of the right to hold a meeting and give a speech in a park with heavy expense and tiresome wait for a final decision in a mandamus action violates the guaranties of free assembly and free speech guaranteed by the First Amendment.

As long as the would-be speaker is obliged to go to the City Council, to wait a week or more upon the Council, or sit by until some busy administrator considers a speech that he wishes to make or his request to hold an assembly, to wait until the latter has time to determine if a meeting can be or cannot be held, and then wait until a trial in the Superior Court and appeal to the Supreme Court of New Hampshire to get a legal opinion upon the issue; then he has been forced to wait a year and is denied the free exercise of his liberties.

Will the writ of mandamus restore the time lost? Suppose a preacher or politician were traveling through the State making a peripatetic tour speaking on his doctrines but, instead of being at liberty to start speaking in each town, he would first be obliged to deal with the local police and appeal civil proceedings and wait for the judges to act at their convenience or pleasure. Would he be free to exercise his right to preach, to lay his oral opinions before the public? Obviously not!

For such an activity, liberty would be effectively destroyed, even if in each town the courts were to force the giving of the permit. By the time the traveler waited for a decision in each place, he may as well surrender his constitutional rights to the 'village tyrants' and give up the thought of reaching the people in this manner. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S.

624, at p. 638. Dissemination of information would be effectively hamstrung, strangled and killed in New Hampshire.

How can appellant be asked to spend time and money asking for a mandamus directed to officials who have defied the Constitution? Before being required to take such an empty procedure, appellant is entitled to have his preliminary question answered: Is this ordinance valid as construed and applied? The basic invalidity of the application and construction of the law immediately ousts the argument that a mandamus must first be sought.

Even assuming that mandamus would lie, it still does not alter the fact that this ordinance as enforced is not only an infringement, it is, moreover, the means of destroying the freedom of assembly and speech from every practical standpoint. Suppose one desires to hold a certain assembly to criticize one of the parties to an election to be held one week hence. The council may refuse to grant the permit. By the time the would-be speaker can get through the courts two or three years may have gone past. Perhaps he has spent all his money getting prepared for the assembly in the first place and does not have the few thousand dollars to spend in litigation; so the right to a free assembly for the poor is entirely abrogated. What the citizen may have to say may be of real value; yet he is prevented from speaking in time to help.

Let us assume that one is a poor man with some very important political submission to make to the people. Possibly he has found some great corruption in the police department, the city council or on the part of some other official who is supported and abetted by the city council. The reformer often finds his cause unpopular; one can almost say that the more need there is for a reformation, the greater is the possibility that there will be somewhere a powerful vested interest in the present corruption.

And so the sovereign citizen in all sincerity spends

money getting ready to expose these disturbing facts that he has ascertained. He is told: "Yes, there is free assembly in this county. You may freely state your opinions; but before you can speak or assemble one minute, you must be prepared to take a mandamus against the city council, which, before it is finished, will most probably cost thousands of dollars." For the rich man this may not be an insuperable obstacle. For the great proportion of the citizens such a view of the law amounts, from a practical standpoint, to a complete prohibition. It is not only the rights of the wealthy and powerful political organizations that must be maintained. The law is no respector of persons. The Court is just as much concerned with the liberty of the average citizen and the contribution that he can make to the welfare of the nation. The sovereign people are entitled to have their rights protected and not after overcoming the hurdle of huge and disproportionate legal expenses in time-consuming mandamus proceedings that amount to clear abridgment.

Quite apart from the previously mentioned destroying financial burden of such litigation is the time factor required for the seeking of judicial review of the refusal of the permit. The speaker who wishes to comment upon an election to be held one month hence would not receive much comfort from the assurance that he is entitled to go to court and carry through a couple of appeals before being entitled to present his thoughts to the people. Even suppose he won the case; how much better off would he be with the knowledge that he now has a right to speak and assemble to deal with the outcome of an election that is already a year or two past? This whole argument of the court below makes a farce of the democratic process and totally removes the practical value of liberty of expression.

In times of emergency it is often essential that it be possible to move quickly and immediately to make information known to the people. There are times when the pub-

lic officials are not too anxious to move on a problem or are afraid to move. Freedom of the people to agitate for changes may result in something's being done before it is too late.

Witness the situation in France during World War II: the country was riddled with fifth columnists, often in high places. It can happen here! If public spirited citizens were at liberty to address the populace, it might be possible to cut out and throw away corruption in office about which much was only recently said in election talks or to remove unfaithful officials before it becomes too late.

If, however, each of them—the local official or the mandamus judge—is able to stand athwart the channels of communication, he could prevent the information from reaching the sovereign people before it was too late. In time of invasion, insurrection, corruption in office, pestilence or other serious emergency, it is often essential that the populace have available speedily independent views on the situation separate and apart from the inertia of officialdom, executive or judicial.

On the view of the law taken by the New Hampshire Supreme Court and the demand that the officials be permitted to deny the permit, subject only to judicial review by mandamus, the value of a free assembly and free speech, from the standpoint of a vital, healthy federally protected weapon, ready for emergencies as something which is open to use by all people, rich and poor alike, would be lost by smothering and burying it in the judicial archives developed or words produced under the procedural law of mandamus and certiorari in New Hampshire.

It is plain, therefore, that compelling a person to resort to the expensive and long legal procedures, forcing the enlistment of the services of expensive lawyers, and running the risk of misinformed judges, in order to correct an abuse of discretion and unconstitutional enforcement of a legal ordinance by city or state administrative officials

is to impose a much too heavy burden or abridgment upon freedom of speech and assembly. The Constitution did not limit the prohibition on burdens and abridgments. It precludes judicial-word burdens and abridgments as a condition precedent to the exercise of these freedoms as much as it proscribes burdens and abridgments by legislative and administrative officials. See *Shelley* v. *Kraemer*, 334 U. S. 1.

The very fact that this case has been pending in the courts of New Hampshire since July, 1950, without having a final determination as to the constitutionality of the administrative construction of this ordinance is proof conclusive that the long delay and tremendous expense will inevitably destroy the First Amendment if every person desiring to exercise his liberties guaranteed by it is forced to appeal to the courts through expensive lawyers and costly judicial proceedings as a condition precedent to the exercise of his civil liberties.

The foregoing considerations and arguments demonstrate that the ruling that was laid down by this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296 should here apply. While there the ordinance was not held to be void on its face, it was decided by this Court that, as construed and applied to the facts by the Connecticut courts, the administrative officials burdened freedoms guaranteed by the First Amendment. The Court in that case rejected the argument that Cantwell should have resorted to the civil process of mandamus as a condition precedent to exercising liberties guaranteed by the First and Fourteenth Amendments. It was pointed out in support of the adverse judgment by the Connecticut court that this procedure was open to the appellants in that case to correct the unconstitutional denial of the permit. See the language of this Court in 310 U. S. at pages 305-307.

The holding of the court below, when it is considered that mandamus at any price or at any time is a condition

precedent to the exercise of liberties guaranteed by the First and Fourteenth Amendments, is a burden and an abridgment although not a prohibition conflicting directly with the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-307.

The court below attempted to evade the obligations imposed by the *Cantwell* holding. The court said: "It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that . . . where the entire statute is not rendered invalid, so that convictions may be had under valid portions."

The court below misapprehended the effect of the holding of this Court in the *Cantwell* case. While the Court said that the statute in *Cantwell* was *invalid as applied* it discloses the belief that certain parts of the statute were held void on its face. This Court held no part of the statute void on its face; the holding of this Court was merely that, as construed and applied to the facts of the case, it was unconstitutional under the First Amendment.

Appellant here made the identical contention that was made in the *Cantwell* case. It is that the ordinance, as construed and applied by the administrative officials at Portsmouth, is an abridgment of liberties guaranteed by the First Amendment. The courts below admit the correctness of this contention, but hurl back upon the appellant their incompetency to determine the question in these proceedings. It is submitted that the present case is not distinguishable from the *Cantwell* case.

The holding of the court below, denying appellant the right to raise his constitutional objections in defense to the prosecution is in direct conflict with *Royall* v. *Virginia*, 116 U. S. 572, 582-584. In that case the licensing tax law was held to be constitutional on its face. As the basis for

the denial of the license the administrative official relied on an unconstitutional statute. The same type of holding was made by the Virginia court in that case as was made by the court below in this case. In this case, like the *Royall* case, there is a valid law. In this case, like the *Royall* case, there is an arbitrary and capricious denial based on unconstitutional concepts of the law. In the *Royall* case there was a valid statute unconstitutionally construed and applied. In this case there is a valid ordinance unconstitutionally applied. The defendant in the *Royall* case was denied a constitutional right under a valid statute and penalized by having his constitutional defense taken away from him. In this case the court below has forfeited the federally guaranteed constitutional rights and denied appellant the right to make his defense based on the federal Constitution in the same way that the Virginia court denied Royall his rights. In the *Royall* case the Court said:

> In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States, and the law, under the authority of which this is attempted, must on that account and in this case be regarded as null and void. (116 U. S. at page 583)

While there is no law of New Hampshire or of Portsmouth which commanded the unconstitutional denial of the permit in this case there was an unwritten policy of the City Council that required it. [17, 46, 47, 52] An invalid unwritten policy relied upon by a City Council is as much within the reach of the Constitution as is a written law to the same effect. *Niemotko* v. *Maryland,* 340 U. S. 268,

at pages 271-272. The unwritten unconstitutional policy in this case gives no stronger support to the decision of the court below than does the written law in the case of *Royall* v. *Virginia*, 116 U. S. 572, at page 583. It is submitted that there is also a direct conflict between the decision of the court below and the holding of this Court in the *Royall* case.

The tergiversation of the New Hampshire Supreme Court in this case alone ought to be sufficient grounds for reversing the judgment of conviction. On the same set of facts disclosed in the record in this case, except for the testimony of the councilmen denying the statements made by the Supreme Court of New Hampshire in its first opinion answering certified questions, the court sustained the validity of the law. It considered the defense of unconstitutionality raised by the appellant in the answer to the certified question. See *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312. When it was confronted with the inescapable duty of passing on the constitutionality of the administrative action by the Portsmouth City Council on the appeal in this case, it chose to elude the duty imposed on it by the First and Fourteenth Amendments by resurrecting and wrongly applying the doctrine of *State* v. *Stevens*, 78 N. H. 268, at page 270. This hedgehopping of sacred constitutional rights of the people of the United States by the Supreme Court of New Hampshire produces a fremendously large area of uncertainty in the field of constitutional law which ought to be extirpated by this Court.

This Court has held that whether a law is valid or invalid under the Constitution "depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another". (*Concordia Fire Ins. Co.* v. *Illinois*, 292 U.S. 535, at page 545) The New Hampshire Supreme Court has, to the contrary, erroneously concluded that this Court has limited the collateral attack against administrative determinations

in civil liberties cases to situations where the ordinance providing for the administrative action is void on its face. See this Court's discussion in the opinion about the holding in *Hague* v. *C. I. O.*, 307 U. S. 496. See also the opinion of the Court of Appeals in *Hague* v. *C. I. O.*, 101 F. 2d 774.

The holding of the court below is that if the laws are constitutional as written by the legislature but are unconstitutional, as enforced, construed and applied by the administrative agency, such attack is made collaterally and is one that cannot be considered except in certiorari proceedings brought directly to review.

This position is patently wrong as far as the federally secured liberties of assembly, speech and worship are concerned. This Court has never made a distinction between the unconstitutionality of a statute written by the legislature of a state invalidly upon its face and because of invalidity as enforced, construed and applied by the administrative departments of the state government. In fact, this Court has repeatedly considered collateral attacks against administrative determinations that constitute unconstitutional enforcement, construction and application of legislative enactments.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, it was held that the ordinance providing for the issuance of the permit was perfectly valid as written. The attack was collateral and identical to that made in this case against the ordinance. It was asserted that the ordinance was invalid as enforced, construed and applied by the administrative officers. This Court considered the contention made collaterally against the administrative determination in habeas corpus proceedings brought to review the conviction in a criminal case. This Court has repeatedly considered and held invalid under the federal Constitution perfectly valid laws as written. The application of the laws was held to be arbitrary, capricious and unconstitutional. The enforcement of them was held to be invalid. See *Greene* v. *Louisville &*

Interurban R. Co., 244 U.S. 499, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 20; *Louisville & Nashville R. Co.* v. *Greene*, 244 U.S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U.S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434.

The decision forces piecemeal litigation. If a person contends that an ordinance is void on its face his remedy is to refuse to comply with it and defend in a prosecution. If the ordinance is said to be invalid as enforced, construed and applied, the only remedy is mandamus or certiorari. Now, is not this an anomalous situation? Does not this make a farce out of litigation? Does it not produce a multiplicity of suits? Does it not split causes of action and grounds of defense? Does it not put a judicial burden and impediment upon the people of the state seeking to exercise their civil liberties?

What could a lawyer do for a client who contends that a law is both unconsititutional on its face and as construed and applied? He, in fairness, ought to be able to make both contentions in one proceeding. The court below, however, has artificially inseminated the law and produced an innovation that forces the lawyer to divide his litigation like an amoeba. Litigation is like the atom; it is dangerous to split. The Supreme Court of New Hampshire has, alas, performed a miracle. It is submitted that this is not the function of temporal powers, judicial though they may be.

The court below, in attempting to elude *Estep* v. *United States*, 327 U.S. 114, and *Gibson* v. *United States*, 329 U.S. 338, has skated onto thin ice. In simulating a distinction of this case from those two cases, the court below states two grounds. First it says that "Poulos has not exhausted his administrative remedies because of his failure to resort to civil proceedings against the city council"; then it declares that "it was essential for the government to show valid orders of the local boards before it could convict for failure to comply with those orders". This statement follows

the observation that it "was not necessary for the State to show the rightful denial of the license". [66]

What is the *administrative* remedy that was available to Poulos? Is there a remedy provided in the ordinance? A search shows none. Is there a statutory remedy for review of contentions that a denial of a permit constitutes an unconstitutional enforcement, construction and application of an ordinance? There is no such statutory administrative remedy on the statute books of New Hampshire.

It is indeed a new theory to say that a judicial remedy is an administrative remedy. It has been universally held by the courts, state and federal, that administrative remedies do not include judicial remedies. The remedies of mandamus and certiorari have been held to be judicial remedies and not administrative remedies. The courts have all (except one) held that it was not necessary to resort to one particular judicial remedy to review an administrative determination, unconstitutionally construing and applying a law, before being entitled to make a defense in a criminal proceeding or a collateral attack in an injunction proceeding. See *Lane* v. *Wilson*, 307 U.S. 268; *Railroad & W. Comm'n of Minnesota* v. *Duluth St. Ry.*, 273 U.S. 625. The court below in its opinion stands alone and ignores the principle of those decisions.

The statement that the Government in draft prosecutions is required affirmatively to prove the validity of the order is not true according to federal criminal procedure. The court below says that the Government in draft prosecutions must negative the invalidity of the draft board order. This has never been the holding of any of the federal courts.

The court below says that all that need be done in a case where a person holds a meeting after there has been a denial of the permit is to show merely that there has been a denial and the holding of the meeting. In federal draft prosecutions the burden is no greater. All the Govern-

ment has to do in those prosecutions is to show the registration, the classification, the acceptance, the order to report for induction and the refusal to comply therewith, and the case is made out. It is incumbent upon the defendant to point out the invalidity of the order in defense. The appellant sought to do this in the court below. The court, for reasons held invalid in the *Estep* and *Gibson* cases, *supra,* refused to consider the defense that the ordinance was unconstitutional. How it distinguishes the *Estep* and *Gibson* decisions according to the true judicial process does not appear. No distinction can be made. The holdings in those cases also control here.

The point made here is demonstrated and supported by the tax assessment cases in New York State. The exclusive remedy prescribed for review of arbitrary and capricious fact and law determinations by tax assessors is certiorari. See Article 13 of the Tax Law of New York. Where the assessors, however, impose taxes upon property exempted by the Constitution and statute, the New York courts recognize that a legal attack can be made collaterally in an action to remove a cloud from the title of the property on the theory that this is an illegal and unconstitutional administrative enforcement of the tax law. See *Elmhurst Fire Co.* v. *City of New York;* 213 N.Y. 87; *People* ex rel. *Erie Railroad Co.* v. *State Tax Commission,* 246 N.Y. 322.

It is respectfully submitted that the construction and application of the ordinance and the law of New Hampshire so as to require the appellant to bring a mandamus action or certiorari proceedings in order to preserve his constitutional rights, and forfeit his rights to a defense in a criminal proceeding brought to enforce the administrative order denying the permit violate the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

III.

The denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, is a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States.

The denial of a defense in this criminal proceeding because the appellant has not sought a writ of mandamus or certiorari to review an administrative order made the basis of the prosecution is a violation of the Fourteenth Amendment. Reference is again made to *Royall* v. *Virginia,* 116 U.S. 572, where this Court said: "To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States. . . ." (116 U.S. 583) See also *Thornhill* v. *Alabama,* 310 U.S. 88, at pages 95-98, and cases cited.

In *McVeigh* v. *United States,* 11 Wall. 259, 267, the Court said that due process of law required that when one is assailed by an indictment or proceeding in the United States District Courts, "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved even in the state court proceedings. In *Hovey* v. *Elliott,* 167 U.S. 409, 413, 414-415, 417-418, this Court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The Court held that the entry of judgment by a state court without affording an opportunity to defend was a violation of the citizen's rights of due proc-

ess. The right to attack any administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U.S. 274, 277-278.

In instances where this precise question has been taken before the appellate courts of some of the other states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People* v. *McCoy*, 125 Ill. 289, 17 N.E. 786; *Fire Department of City of New York* v. *Gilmour*, 149 N.Y. 453, 44 N.E. 177; *State* v. *Rachshowski*, 86 Conn. 677; *People* v. *Kaye*, 212 N.Y. 407, 416; *State* v. *Weimar*, 64 Iowa 243; *State* v. *Kirby*, 120 Iowa 26; *Crane* v. *State*, 5 Okla. Cr. 560; *Richter* v. *State*, 16 Wyo. 437; *Stevens* v. *Casey*, 238 Mass. 368, 117 N.E. 599.

There is no reasonable basis for the denial of the right to be heard in defense to the prosecution. How is the State to be hurt by allowing one charged with speaking in a park without a license permit properly applied for to challenge the constitutionality of the denial? Ultimately it is the same court that decides the matter whether it is by mandamus, certiorari or criminal proceedings. The powers of the criminal court are as broad as the powers of the civil court. It seems under the federal Constitution to be highly unreasonable and hypertechnical to gag the judge of the criminal court and by a violation of due process of law forbid him from doing justice. The present case is a typical example of the absurdity of the procedure established. In this case the court heard the evidence as extensively as it could have been received in a mandamus or certiorari proceeding. Yet the doctrine of *State* v. *Stevens*, 78 N.H. 268, has blinded the court below to justice. What good comes to the procedure of New Hampshire by forcing this conclusion? The burden on the courts is no different whether it be by

criminal proceedings or by civil that the invalidity of the denial is considered.

The reasons against the doctrine of the *Stevens* case are much stronger. The welfare of the people is served best by granting a hearing in a criminal case brought to enforce the order of the administrative agency where there has been no civil review. The citizen is entitled to his day in court, especially in criminal proceedings. It brings criminal proceedings and the courts into disrepute to deny the right of self-defense, which is accorded even by the barbarians. Through niceties and the doctrine of convenience the court below has denied just that—appellant's right to self-defense, guaranteed by due process of law.

Such doctrine sets a trap for the unwary. The citizen who attempts to exercise his civil liberties falls through the trap door of the doctrine of *State* v. *Stevens,* 78 N.H. 268. While attempting to hold secure his rights, he finds that a gin is set for him by the Supreme Court of New Hampshire in the *Stevens* case, *supra.* It is penalizing to ordinary citizens desiring to have their say on important matters of public interest, many of whom are ignorant of the procedural niceties and technicalities of criminal procedure, to catch them unawares in the insidious *Stevens* doctrine. What does the State profit by such rule? How is the State injured by allowing a defense?

It is respectfully submitted that the holding in this case has denied the appellant his procedural rights in criminal cases guaranteed by the Fourteenth Amendment. For this reason alone the judgment should be reversed.

The holding of the court below in this case so as to follow *State* v. *Stevens,* 78 N.H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder, contrary to the provisions of Clause 1, Section 10, Article I of the United States Constitution.

This point was not raised in the trial court. It was not raised in the Supreme Court of New Hampshire until the motion for rehearing was filed. In that motion it was explicitly raised. It is the belief of appellant that, although if belatedly raised, it was considered and determined by the Supreme Court of New Hampshire on the denial of the motion for rehearing.

While this particular point was not raised in the bill of exceptions in the Supreme Court that was brought up from the trial court, this failure does not bar the consideration of it here because it was timely presented in the petition for rehearing.

The refusal to consider the unconstitutionality of the ordinance, as construed and applied in this criminal case, was a surprise and a reversal of the action of the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, where the identical question was raised, whether the ordinance was valid, as construed and applied. See the question presented in *Cox* v. *New Hampshire*, 312 U. S. 569.

It is true that *State* v. *Stevens*, 78 N. H. 268, stood in the books of decisions of the court, yet it was not believed to be applicable in view of the later decision in *State* v. *Cox*, 91 N. H. 137. Under these circumstances, while this point of law was not urged in the Supreme Court of New Hampshire earlier, it was time enough to raise the question here in view of the holding of this Court in *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-678. See also *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-367.

The denial of the petition for rehearing, without a discussion of the question, was sufficient in view of the reversal of the position taken by the New Hampshire Supreme Court in the *Cox* case. *Ohio* ex rel. *Bryant* v. *Akron Park District*, 281 U. S. 74, 79.

The appellant is, therefore, in a position to urge this point now before this Court.

The holding of the court below in this case so as to follow *State* v. *Stevens*, 78 N.H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder contrary to the provisions of clause 1 Section 10 Article I of the United States Constitution.

Section 10 of Article I of the United States Constitution reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *Missouri*, 4 Wall. 277.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of bills of attainder in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the attainder clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp.

66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Bills of attainder and bills of pains and penalties were first used in England as early as 1321. It was not until the civil war, which engendered passions, that bills of attainder were widely used. (*The Catholic Encyclopedia*, Vol. 11, p. 59). They were particularly and extensively used during the reign of the Tudor kings to accomplish acts that could not be done through the regular judicial process. *Encyclopedia Britannica*, 1940 ed., Vol. 2, p. 656.

"A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime." Cooley, *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

"The injustice and iniquity of such acts, in general constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most lible (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Story, *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216.

Here the ordinance has been construed so as to require the appellant to comply with the unconstitutional denial of the use of the park by waiting until the civil courts have

eviewed, as a condition to obtaining judicial review. If e does not, upon his trial it is conclusively presumed that he administrative decision is valid and that he illegally efied it. In defense to the prosecution he cannot show hat he had a good defense. This is a denial of a judicial rial. He is penalized because he defied the administrative gency. If he submits to prior civil trial, a judicial trial nay be accorded him if he applies for it by petition for rit of mandamus.

The very fact that judicial review of the adminis- rative action is accorded by mandamus to a person who hallenges the administrative decision and the same is enied to a person who exercises his constitutional right s proof positive that the penality imposed against the efendant is a denial of a judicial trial. And when so ap- lied the ordinance is thereby transformed into a bill of ains and penalties. The general type of bill of attainder is ny law that deprives a person of judicial trial.

This Court had occasion to examine into the history f bills of pains and penalties when its opinion was written n *Cummings v. Missouri*, 4 Wall. 277, 320-332. In that ecision the provisions of the Missouri Constitution and nd statutes providing for a certain class of persons to take test oath were declared unconstitutional because com- rising a bill of pains and penalties, contrary to federal onstitution, Article I, Section 9, clause 3. In that decision he Court said:

"It was against the excited action of the States, under uch influence as these, that the framers of the Federal onstitution intended to guard. In *Fletcher* v. *Peck*, 6 ranch 137, Mr. Chief Justice Marshall, speaking of such ctions, uses this language: 'Whatever respect might have een felt for the States sovereignties, it is not to be dis- uised that the framers of the Constitution viewed with ome apprehension the violent acts which might grow ut of the feelings of the moment, and that the people

of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . ."

". . . The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself before the said first day of February for trial the penalties and disabilities declared should be void and of no effect. (6 *Howell's States Trials*, p. 391.)

"'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it. . . .' (*Haines* v. *Buford*, 1 Dana 510)"

The similar provision of the federal Constitution prohibiting bills of attainders by the federal government has been considered and invoked in *United States* v. *Lovett*, 328 U.S. 303. The mere fact that the vice here complained of is committed by the courts rather than the legislature does not change the matter any. A bill of attainder may result from a court decision which construes a legislative act. It is axiomatic that the constitutionality of a law depends on how it is interpreted by the courts as well as how it is written by the legislature. The bill of attainder provisions of the federal Constitution stops the hands of the courts as well as the legislature.

"The Constitution deals with substance, not shadows.

Its inhibition was levelled at the thing, not the name." (*Cummings* v. *Missouri*, supra.)

In the criminal proceedings brought against the appellant in the Superior Court he was denied his right to have his motion for judgment of acquittal granted. It asserted that the enforcement, construction and application of the ordinance was unconstitutional. The judgment of the trial court and of the court below struck out as immaterial all of the evidence showing the unconstitutionality and convicted appellant without regard to the evidence establishing admitted capriciousness in the unconstitutional denial of the application for the permit.

The sole question determined by the trial court was whether or not the appellant violated the order of the administrative agency. Whether or not the administrative determination was unconstitutional, the courts have held, may not be considered. What could be a worse denial of a judicial trial? The courts have held that the court will consider the evidence of the prosecution but not of the defense. This Supreme Court of New Hampshire has approved that type of highhanded judicial action which harks back to the ancient days of the Star Chamber and trials by ordeal which the founding fathers of the United States fled from and sought to insure the people against. Yet we find that in these modern days, under the sheep's clothing of convenience, the wolf (bill of attainder) has sneaked into the courtrooms of New Hampshire to devour blind justice.

The Kentucky Court of Appeals, in *Gaines* v. *Buford*, 1 Dana 481, held an act of the legislature to be a bill of attainder. The legislature ordered owners of certain lands to make certain improvements on or before a certain date. Pursuant to the act, failure to comply with the order automatically forfeited the title and vested it in the Commonwealth.

In *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature

violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of office holders within the Commonwealth. Administrative agencies, called [in the act] "boards of contest", were established. The findngs of these boards were made final by the statute with reference to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease an desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

" . . . it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'. . . . The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and determine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duites, and to the determination primarily of more questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine

finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to whether or not he was a citizen, was held to violate the bill-of-attainder clause of the Constitution, in the case styled In re *Yung Sing Hee* (Circuit Court, Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis* v. *Berry,* 216 F. 413.

The Supreme Court of New Hampshire has held that the usual right of a defendant in criminal proceedings ought to be denied in this criminal trial on the grounds of a technical violation of orderliness and a rule of convenience. This is said to promote criminal justice and to be a deserving instrument of orderliness.

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to comply with an administrative order without insisting that this is a measure of judicial convenience, that one who fails to comply with the rule is to be regarded as the "domestic rebels" of medievel times with no rights under the law or Constitution, and that the crime is of such an odious nature that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, a right to a judicial trial. It is said that Poulos who refused to comply with the administrative policy and determination of Portsmouth is nothing more than criminal. It may, for the sake of argument only, be conceded that he is such. Is he not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it

please the Court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them, and if the guilty have no claim on the rights conferred by these laws, then they are mere nullities.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tryant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and establish fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such as they have.

It is respectfully submitted that the denial of the right to show the unconstitutionality of the policy of enforcement by the city of Portsmouth was a denial of a judicial trial. The denial of a judicial trial violates the constitutional prohibition of a bill of attainder. The judgments of the courts below are rendered in violation of that federal prohibition and ought, therefore, to be reversed.

IV.

The judgments of the courts below are not supported by adequate nonfederal grounds and therefore the federal questions presented must be considered and determined.

This Court is the tribunal to determine whether the nonfederal ground is substantial. *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773. The evasive decision by the court below

which did not consider the question raised is not conclusive on this Court.

The determination that appellant must first sue for a writ of mandamus instead of exercising his constitutional liberty is a burden and an abridgment of the rights guaranteed by the First Amendment that itself constitutes a federal question. "Where the non-Federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain." (*Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 166.) The doctrine of *State* v. *Stevens*, 78 N. H. 268, was perhaps sufficient for general rights but, when applied, itself became a burden on freedom of speech and assembly under the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, and *Near* v. *Minnesota*, 283 U. S. 697.

When the history of the consideration of this question is considered it is apparent that the Supreme Court of New Hampshire is arbitrarily employing a device to prevent a review of the federal question. On certified questions it found enforcement of the ordinance to be valid under the federal Constitution because of the unwritten policy of the city council to zone the parks, permitting meetings of a religious nature in some and denying in others. When the question was brought back to it the second time it was evaded because of the failure to apply for a writ of mandamus. It is submitted therefore, that review by this Court cannot be evaded by the Supreme Court of New Hampshire by a nonfederal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U. S. 147, at page 164. See also *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 226, 230-231; *Davis* v. *Wechs-*

ler, 263 U. S. 22, 24; and *Brown* v. *Western Railway*, 338 U. S. 294, 299.

Where, as here, a determination by a state court is placed solely upon grounds of state or general law, but a federal claim was timely and properly asserted in the state courts, the failure of the state courts to pass upon the federal question thus asserted is not conclusive upon the Supreme Court of the United States. It will proceed to determine whether the nonfederal ground of decision independently and adequately supports the judgment. *Chicago B. & Q. Ry.* v. *Illinois* ex rel. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *Illinois* ex rel. *City of Chicago*, 201 U. S. 506, 519-520; *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

It is submitted that the procedural basis for the affirmance was not an adequate or a sufficient state ground to support the judgment below.

Conclusion

It is submitted that the decision of the Supreme Court of New Hampshire should be reversed because it conflicts with the holdings of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, and *Royall* v. *Virginia*, 116 U. S. 572, and is otherwise erroneous for the reasons above discussed. The judgment of conviction ought to be set aside, and the court below directed to enter a judgment of acquittal because of the unconstitutionality of the policy of the city of Portsmouth in the enforcement of the ordinance regulating public meetings in the parks of Portsmouth.

If the Court does not now conclude that the judgment should be set aside and an acquittal entered, then the judgment of the Supreme Court of New Hampshire ought to be vacated and the cause remanded to it with directions to consider and determine the constitutionality of the construction and enforcement of the ordinance by the city

officials of Portsmouth according to the circumstances that existed on the date that appellant was arrested for exercising his constitutional rights in the park without a permit when he was illegally denied it by the City Council. See *Musser* v. *Utah*, 332 U. S. 95.

Respectfully submitted,

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